No. 14468

IN THE

United States Court of Appeals

For the Ninth Circuit

P. W. SIEBRAND and HIKO SIEBRAND, Doing Business as SIEBRAND BROTHERS CIRCUS and CARNIVAL,
Appellants,

vs.

GEORGE F. GOSSNELL and ESTELLA GOSSNELL, His Wife,
Appellees,

and

S. J. CAROLL,
Appellant,

vs.

GEORGE F. GOSSNELL and ESTELLA GOSSNELL, His Wife,
Appellees.

Reply Brief of Appellants, P. W. Siebrand and Hiko Siebrand.

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Reply Brief of Appellants, P. W. Siebrand and Hiko Siebrand.

(Figures in Brackets refer to page of the Transcript of Record)

The appellants, for the sake of clearness, will continue to use the same designation of the parties, as used by appellants in their opening brief and appellees in their brief, to-wit: P. W. Siebrand and Hiko Siebrand the appellants being referred to as "the defendants", and the appellees George F. Gossnell and Estella Gossnell being referred to as "the plaintiffs." The appellant S. J. Carroll is referred to as "the truck driver."

Reply to Appellees' Legal Argument Concerning Proposition of Law No. 1

Plaintiffs accept and agree with the defendants' basic premise set forth in Proposition of Law No. 1 that the doctrine of res ipsa loquitor has no application where the cause of the accident is unexplained, and might have been due to one of several causes, for some of which defendants are not responsible; but urge that it has no support from the facts of the case. We direct the Court's attention to our opening brief to answer this contention.

Plaintiffs cite *Weedle v. Loges,* 52 Calif. App. 2d, 115, 125 Pac. 2d, 914, which case in turn cites from an earlier California case, *Speidel v. Lacer,* 2 Calif. App. 2d, 528, 38 Pac. 2d, 477. In *Speidel v. Lacer, supra,* the plaintiff was injured by a defective automobile hoist installed by Lacer and operated and maintained by the Standard Oil Company. The Court held the doctrine of res ipsa loquitor inapplicable, and, in this regard, stated:

> "When a thing which causes injury without fault of the injured person is shown to be under the *exclusive control of the defendant* and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."

At page 9 of their brief, plaintiffs quote from *Weedle v. Loges, supra,* part of which is as follows:

> "It has been held that the doctrine of res ipsa loquitor may not be invoked where there is a divided

responsibility and the negligence is in part that of a third party over whom defendant has no control."

Defendants urge that the statements from the *Weedle* and *Speidel* cases above quoted are in direct support of defendants' contention that the doctrine of res ipsa loquitor has no application in this case. It should be remembered that the trailer belonged to William Siebrand (T.R. 248 and 250), who was not one of the defendants in the case. There was absolutely no evidence that the trailer hitch on the truck which belonged to Pete and Hiko Siebrand was defective. Moreover, the only testimony concerning the trailer hitch on the truck was that such hitch was in good working order after the accident and in no way contributed to the accident (T.R. 238). Thus, we have a case where there is a divided responsibility, and the negligence, if any, is in part that of a third party, over whom defendants had no control and was not made a party to the action.

At page 10 of plaintiffs brief, they quote from page 133 of the Transcript of Record, and urge that, even in the absence of res ipsa loquitor, there is sufficient evidence of negligence on the part of the defendants. Again, it is to be noted that the evidence refers to the trailer owned by William Siebrand. It likewise states that there was no chain and lock on it. In spite of the fact that the judge instructed counsel that he could find no law requiring safety chains (T.R. 143), they persist in advancing the theory that there is such a law, and rely on it to establish defendants negligence.

Defendants re-assert that the facts of this particular case do not fall within the doctrine of res ipsa loquitor, and in the absence of such doctrine the plaintiffs have

wholely failed to prove negligence on the part of the defendants.

Reply to Appellees' Legal Argument Concerning Proposition of Law No. 3

Counsel for plaintiffs do not dispute the contention of the defendants that the liability of the master is limited to the amount recovered against the servant where the master's liability is entirely derivative and unequivocally concur in this statement of law. Their entire disagreement with defendants' proposition of law No. 3 is their contention that the defendants were guilty of independent acts of neglect other than those arising from the conduct of the truck driver. In admitting this proposition of law, which is the universal rule concerning the matter, we respectfully represent that plaintiffs have admitted that the judgment in this case can be no greater against the defendants than the one hundred dollars assessed against the truck driver. As stated in our opening brief, the plaintiffs did not allege or prove any independent acts of negligence on the part of the defendants. It is to be noted that the only paragraph alleging negligence on the part of the defendants is set forth on pages 14 and 15 of appellees' brief, and on page 33 of appellants' brief. The pertinent part of this particular allegation states:

> "That on February 20, 1953, while plaintiffs were proceeding in their automobile in a Northerly direction on the Tempe Bridge * * * defendants so negligently, carelessly and wantonly maintained and operated their motor vehicle and heavily loaded trailer attached thereto, * * *"

This allegation could only refer to the particular time and place, while plaintiff's car was on the Tempe

Bridge and the truck was either on the bridge or rapidly approaching the bridge. The only possible negligence of the defendants could be the acts of the truck driver, inasmuch as they were not present at the time. If plaintiffs had intended to allege negligence on the part of the defendants in failing to keep the truck and the trailer properly in repair, they should have inserted a separate paragraph so stating. Plaintiffs cite the case of *Morris v. American Liability Surety Company,* 185 Atlantic 201, 322 P.A. 91, as defining the word "maintain". In this case, the word "maintain" was defined as used in a policy of insurance. We don't disagree with the definition given therein, as one of the definitions of the word "maintain", but contend that such definition has no application to the way in which the word was used in the allegation of plaintiffs' complaint. In *Evans v. Byrally Transp. Co.,* 197 A, 758, 124 Conn. 10, the Court considered the question as to whether or not the plaintiff had alleged that defendant's truck was moving or stationary. The complaint stated,

> "The operator was negligent in that he operated and maintained the truck without lights in the rear; that stopping and parking it on the traveled part of the highway constituted a dangerous obstruction."

The Court held that the words "operated" and "maintained", as used in the allegation in the complaint, did not mean that the truck was moving. The Court stated,

> "Most common words are used in different senses according to the context in which they appear."

We assert that the plaintiffs used the words "operate" and "maintain" in their complaint to signify the

truck driver's conduct at the particular time the car and truck were approaching the Tempe Bridge.

We refer the Court to defendants' opening brief, under this proposition of law, supporting the view that there was no evidence of the defendants' negligence independent of the imputed negligence of the truck driver. It should be remembered that the trailer did not belong to the defendants, and they were under no obligation to keep it in good repair. The truck driver hooked up the truck and trailer, in the absence of the defendants, (T.R. 205) and if there was any negligence in this respect, either as to the failing to properly connect the truck and trailer, or failing to notice a defect in the trailer hitch, such negligence was that of the truck driver, and could only be imputed negligence insofar as the defendants were concerned.

Reply to Appellees' Legal Argument Concerning Proposition of Law No. 4

Plaintiffs continue to urge, in opposition to this proposition of law, as they have done before, and consistently did throughout the trial, that defendants were negligent because of the absence of safety chains. This argument will be considered in connection wtih Proposition of Law No. 6.

Under this proposition of law, defendants, in their opening brief, cited many cases to support the statement that damages against joint tort feasors cannot be apportioned, but must be for a lump sum and in the same amount against all such joint tort feasors. All of these cases were instances where inconsistent verdicts were awarded by the jury against joint tort feasors,

and the appellate court reversed such inconsistent verdicts as being contrary to law. Plaintiffs ignore these —cases and cite *Bigelow v. Old Dominion Copper Mining and Smelting Company,* 225 U.S. 111, 56 Law Ed. 1009, 32 Supreme Court 6417, on page 17 of their brief; and *Johnson v. Pullman Company,* 200 Fed. 2d 751, on page 18 of their brief, to support their contention that a judgment may be assessed in unequal sums against all who are joined. The *Bigelow* case turned on two points. First, that the judgment in favor of one tort feasor creates an estoppel as to the other defendant. Second, does the failure to give credit to such judgment in another case deny full faith and credit? We submit the case is not in point. It does not concern a judgment for unequal sums between two joint tort feasors, and it does not hold that the judgment can be unequal against two joint tort feasors. Likewise, the case of *Johnson v. Pullman Company, supra,* is not in point. It concerns the question of estoppel by judgment. The question of unequal verdicts is not in issue or even mentioned.

Plaintiffs, at page 18 of their brief, urge that Arizona has a statute which covers the matter. A reading of the statute by itself clearly controverts this argument. The statute doesn't mention apportionment of damages. The statute does nothing more than abrogate the old common law rule that required a judgment in an action against several defendants to be against all or none. 49 CJS, Sec. 33, page 75. The *Bigelow and* Johnson cases, and the Arizona statute, are the only authorities cited by the plaintiffs in opposition to defendants' proposition that the judgment against two joint tort feasors cannot be apportioned; and we submit that those authorities are not in point.

On page 18 of their brief, plaintiffs assert in bold type that the defendant S. J. Carroll did not deny that he acted as agent and servant of the Siebrands. This statement is not true. (T.R. 203, 204, 205).

Plaintiffs next urge that defendants are too late to take advantage of the inconsistent verdicts after judgment has been entered thereon. They cite *Flush v. Erie Railroad Company,* 110 Fed. Sup. 118, to support this contention. In this case, the court tried two actions together—a negligence case and an indemnity case. Before and after receiving the verdict, the court inquired of counsel whether they desired the court to ascertain more clearly the meaning of this lengthy verdict. Counsel expressed no such desire. The court further held that the special verdict in the indemnity case was not in irreconcilable conflict with the general verdict in the negligence action. In addition to this, the court held that where the jury's verdict is in irreconcilable conflict, the verdict cannot be sustained. Plaintiffs, at page 19 of their brief, state that the defendants failed to object to the form of the verdicts when they had an opportunity to do so. The submitted forms of verdict are found on page 328 of the Transcript of Record, and the verdicts as submitted are not necessarily inconsistent. They only became inconsistent when the jury found against both the defendants P. W. Siebrand and Hiko Siebrand and the defendant S. J. Carroll and assessed damages in different amounts.

It is also true that the plaintiffs failed to object to the form of verdict, and, likewise, failed to request that the jury, upon return of the verdicts, be instructed to return to the jury room and clarify the verdicts; but,

rather, the plaintiffs moved for a judgment on the verdicts as returned.

The plaintiffs cite *Volume* 3, *Am. Jur., Sec.* 393, *at page* 126, as supporting the theory that an objection to the formal sufficiency of a verdict comes too late for consideration on review when not made until after the jury has been discharged. *Walter v. Louisville Railroad Company,* 150 Ky. 652, 150 S.W. 824, is one of the cases in the footnote purporting to sustain this statement of law. In that case, the jury brought in the following verdict,

> "We the jury do not find the defendant guilty."

The plaintiff contended that this verdict was ambiguous, and, in effect, constituted a hung jury. The court could not agree with this contention, but stated that any objection to the formal sufficiency of the verdict should have been made before the jury was discharged so the jury could have clarified such mistake. The other case cited in the footnote of Am. Jur. likewise turns on the formal sufficiency of the verdict. In *State v. Amidon,* 2 A. 154, 58 Vt. 524, a formal defect was defined as follows:

> "It is obvious without illustration that a defect that does not effect the merits of the case or the evidence necessary to be given to maintain the indictment could be regarded as only formal."

We submit that the inconsistent verdicts found by the jury in this case go far beyond a mere formal defect. In all of the cases cited by plaintiffs to support their contention, the statement is found that before the verdict may be set aside, there must be an irreconcilable

conflict. In the many cases cited by the defendants under this proposition of law where the verdicts were inconsistent and very similar to the one in the present case, there was not one instance where the court refused to consider the matter because an objection was not made before the jury was discharged.

Plaintiffs conclude their argument on this proposition of law by commenting that the defendants and the truck driver, from the inception of the case, adopted two different theories, filed two different answers, employed two different attorneys and asked for two separate verdicts. We fail to see that this has any significance whatsoever. There was only one tort and one accident wherein the plaintiffs were injured. If the defendants and the truck driver were both guilty of negligence, and such negligence was the proximate cause of the injury, then they were joint tort feasors, and the judgment against both should be in the same amount. If the truck driver was not negligent, then the jury should have exonerated him completely. The jury acted clearly beyond its lawful authority in returning two wholely inconsistent verdicts. 86 C.J.S., Sec. 34, page 949.

Reply to Appellees' Argument On Proposition of Law No. 5

Plaintiffs' argument, directed to Proposition of Law No. 5, is two-fold. First, that the judgment is reasonable; and, second, that the question of excessive damages cannot be raised on appeal. It is interesting to note that on page 22 of their brief, plaintiffs set forth certain items of damages totalling $41,301.00; yet, failed to indicate the pages of the Transcript where testimony

was adduced supporting such amounts. The reason for this omission is obvious. Only the first two items, in the amounts of $12,027.00 and $1,474.00, were substantiated by the evidence. Mr. Gossnell testified that he was still receiving his commissions from his customers, even though he had not been working (T.R. 70); and there was absolutely no testimony as to the amount of future medical expenses or to the amount of future earnings that the plaintiff George Gossnell would lose. As a matter of fact, there is no evidence that the plaintiff George Gossnell will have any definite permanent injury (T.R. 173, 174).

In support of plaintiffs' contention that the matter of excessive damages is not subject to review, they cite, on page 24, in re *Central Railroad of New Jersey,* 52 Fed. 2d 20; yet, it is significant that in that very case the Second Circuit Court of Appeals stated ,with the Honorable Learned Hand as one of the judges, in a per curiam decision,

> "Award of damages for personal injuries, though enjoying a large presumption of correctness, may be changed by appellate court on review."

And in this particular case, the appellate court reduced the judgment of one plaintiff from nine thousand to sixty five hundred, another from fifteen hundred to eight hundred, and another from six hundred to four hundred; stating in each instance that the verdict was excessive. In the case of *Earl W. Baker and Company v. Lagaly,* 144 Fed. 2d 344, the Tenth Circuit Court held,

> "In a death action the verdict will not be disturbed on appeal for excessiveness unless it is so

plainly excessive as to suggest that it was the result of passion or prejudice on the part of the jury."

In *Alabama Great Southern Railroad Company v. Johnson,* 140 Fed. 2d, 968, the Fifth Circuit Court of Appeals stated:

> "The appellate court may not relieve against excessive verdict merely because it is excessive, but large size of verdict justifies appellate court's careful scrutiny of errors specified which may have produced it."

We respectfully urge that by the jury returning a verdict of one hundred dollars against the truck driver, who presumably had nothing, and ninety five thousand dollars, against the defendants, who were the owners of the circus, the conclusion is obvious that the jury could have only so acted as a result of bias and prejudice.

Reply to Appellees' Argument On Proposition of Law No. 6

Appellees answer appellants' argument in connection with the Proposition of Law No. 6 by insisting that the law of the State of Arizona does require safety chains and cites Section 66-183, Ariz. Code of 1952, Cum. Supp. as supporting this proposition. We respectfully urge the court that this section of the Arizona Code does not require safety chains; and the court stated to counsel during the trial that he was unable to find any section of the Arizona Code which required a trailer to be connected to a truck with safety chains. (T.R. 143) Apparently the only authority that plaintiffs can cite that requires safety chains is the testimony of Officer Boyd, and counsel for plaintiffs does cite such testimony on page 25 of their brief as authority

to support their contention. This, of course, is preposterous, and has absolutely no effect whatsoever. Yet, counsel, during the trial, repeatedly maintained that safety chains were necessary and required by law. Likewise throughout plaintiffs' brief they have consistently maintained that the defendants were negligent because they failed to use safety chains. It was after these repeated attempts by plaintiffs to insist that safety chains were necessary that defendants objected to such statements. Plaintiffs cite Sec. 3 Am. Jur., Sec. 872, page 417, as supporting their contention that defendants have waived any objections to the testimony concerning safety chains. The first sentence of this section reads:

> "The necessity of presenting and reserving questions in the lower court and the effect of failure to do so have been considered at length in an earlier part of this article. As is there pointed out in detail, failure of the injured party to call the attention of the trial court to an alleged error at the time when it occurs, or at least while it is still within the power of the trial court to correct it, amounts, ordinarily, to a waiver of the error or creates an estoppel against bringing it to the attention of the appellate court."

As stated at page 43 of defendants' opening brief, counsel for defendants did object to plaintiffs' repeated questions concerning safety chains. (T.R. 238) At this stage of the trial, it was not too late for the trial court to correct the error. If it had sustained the objection that the question as to safety chains was immaterial, then the jury would have realized that it was not necessary that the defendants have safety chains; but by overruling the objection, the trial court impliedly indicated that safety chains were required by law, and by so doing prejudiced the defendants.

Reply to Appellees' Argument On Proposition of Law No. 7

Plaintiffs' argument on Proposition of Law No. 7 is based upon statements from 3 Am. Jur., Sec. 879, page 430, and 3 Am. Jur., Sec. 873, page 419, to the effect that the right to complain of error in the admission of evidence may be waived by introducing similar evidence in opposition; and that the appellant cannot complain of error in the admission of evidence which he himself offered or drew out. Concerning the testimony given during the deposition, on page 28 of plaintiffs' brief, such testimony was only gone into by the defendants on cross examination after such testimony had already been admitted over defendants' objection. The direct testimony and objection thereto is found at page 111 of the Transcript of Record. The matter on cross examination is found at page 117 of the Transcript of Record. Likewise, the alleged statements of Mr. Siebrand, found at pages 28 and 29 of plaintiffs' brief, to the effect that Mr. Siebrand introduced Mr. Carroll to Mrs. Gossnell, as,

> "This is Mr. Carroll, the man who was driving the truck for us that day, and I brought him over to see you."

At page 81 of the Transcript of Record, this matter was introduced by the plaintiffs and objected to by the defendants. The defendants went into the matter in an attempt to impeach or explain on cross examination, at page 92 of the Transcript of Record. We respectfully submit that the rule of law stated by the plaintiffs does not prevent a party from inquiring, upon cross-examination, in an attempt to explain or contradict such state-

ment, without waiving his original objection. In 3 Am. Jur., Sec. 873, at page 422, it is stated:

> "Error in allowing the plaintiff in a personal injury case calling the defendant as a witness, to examine him as to his wealth is not waived by the defendants examination in his own behalf, amounting to nothing more than additional cross-examination to explain some of the matters brought out in his examination by the plaintiff, and being directed not to the amount of his property, but to the character of his interest therein;"

By prohibiting a party, on cross-examination, from attempting to explain certain damaging testimony improperly admitted on direct examination, unless such party waived his original objection, would be grossly unfair; and, perhaps, force the party into an appeal when the matter could have been adequately explained.

Reply to Appellees' Argument On Proposition of Law No. 8

The plaintiffs' attempt to summarily dispose of the case *Gottlieb Brothers, Inc. v. Culbertson,* 152 Wash. 205, 277 Pac. 447, cited and relied upon by the defendants in their opening brief, by stating that the case concerns liability of joint adventures in contract and not in tort. This is no answer at all. The elements necessary to constitute joint adventure are the same, and must be present before a joint adventure exists. After a joint adventure is in existence, then liability is determined according to the law of torts or contracts. Just as in a partnership, the law of contracts or torts does not determine whether a partnership is in existence,the law of partnership is controlling in such a matter. We submit that the rules of law set forth in the

Gottlieb case, concerning joint adventure, are proper statements of the law, and stand unrefuted by the plaintiffs. The *Gottlieb* case is very similar to the present case, and, as stated in our opening argument under this proposition of law, the court erred in failing to give plaintiffs' requested instructions concerning joint adventure based on the *Gottleib* case. We think it is significant that plaintiffs have failed to cite a single case stating that sharing the losses is not an element of joint adventure.

At page 30 of the plaintiffs' brief, they cite *O. K. Boiler and Welding Company v. Minnetonka Lumber Company,* (Okl.) 229 Pac. 1045, as supporting the proposition that the common law did not recognize the relationship of co-adventure. The statement in such case reads as follows:

> "While it is true at common law the courts do not recognize the relationship of co-adventure, unless the elements of partnership were disclosed and proven, but in the passage of time, the rule has been liberalized by decisions of the court. See note to ann. cas. 1916a, page 1210."

The case does not support the proposition for which it is cited.

Plaintiffs contend at page 30 and 31 of their brief that the question as to whether or not the payments by William Siebrand to the defendants was rent, as distinguished from profits, was a question of fact for the jury which the jury resolved in favor of the plaintiffs. Defendants attempted to get this specific question referred to the jury in their instruction No. 4, but the court refused to give the instruction; and, as pointed

out in our opening brief under this proposition of law, failure to give such instruction was prejudicial error against the defendants.

The plaintiffs cite no other cases in opposition to defendants' argument under Proposition of Law No. 8, except two cases stating the general law, that if the instructions as a whole substantially and correctly cover the law applicable to the issues, the judgment will not be reversed on appeal, even though the instruction may be open to criticism. In answer to this, we refer the Court to our original argument under Proposition of Law No. 8, where it is pointed out that a correct definition of joint adventure was not given, and the instructions that were given did not properly state the law concerning joint adventure. Our original argument also covered the question of the insufficiency of the evidence to establish a proper case of joint adventure, and this matter will not be discussed again in the reply brief, but we refer the Court to our opening brief under this proposition of law.

Reply to Appellees' Argument On Proposition of Law No. 9

The plaintiffs, in their argument in opposition to Proposition of Law No. 9, rely solely upon the theory that a court's order denying a motion for satisfaction of judgment after payment is not subject to appeal. In support of this proposition, they rely principally on the case of *Hatzenbuhler v. Talbot,* 132 Fed. 2d, 192, wherein the Seventh Circuit Court of Appeals did rule that such an order was not an appealable order. In this particular case, it was a three-judge court, and one of the judges dissented from the decision, stating that in

his opinion such an order was an appealable order. In *Lillie v. Dennert,* 6th Cir., 232 Fed. 104, it was held that an order entered upon a motion to require satisfaction of judgment is appealable. This same rule is also found in *Herrick v. Wallace,* 114 Ore. 520, 236 Pac. 471. Also, in 34 C.J., Sec. 1128, at page 731, it is stated:

> "An order entered upon a motion to compel satisfaction of judgment is appealable, and at least in some jurisdictiions may be reviewed by certiorari."

We respectfully urge that this Court should follow the ruling in the case from the Sixth Circuit, and also the rule set forth in Corpus Juris, that an order entered upon a motion to compel satisfaction of judgment is an appealable order. To fail to so rule might well necessitate another appeal to this Court at a later date concerning the question as to whether or not the judgment against the defendants Siebrand has been satisfied.

CONCLUSION

For the reasons hereinabove set forth, as well as those discussed in our opening brief, we respectfully urge that this Court should declare that the judgment against the truck driver Carroll has been satisfied, and thus the judgment against the defendants Siebrand has been satisfied. Should the Court disagree on this point, we then urge the Court that a new trial should be granted, limiting the damages to be assessed against the defendants to the sum of one hundred dollars, the amount heretofore recovered against the truck driver Carroll. In the event the Court disagrees with the first two propositions, we submit that at least the defendants

are entitled to have the ninety five thousand dollar judgment reversed, and a new trial awarded. Should the Court likewise disagree with this contention, then we respectfully urge that the verdict against the defendants Siebrand is excessive and was granted under passion and prejudice and should be limited to a reasonable amount.

Respectfully submitted,

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